**YUSOFF KASSIM**

**v.**

**PUBLIC PROSECUTOR**

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
PEH SWEE CHIN SCJ
EDGAR JOSEPH JR SCJ
[SC CRIMINAL APPEAL NO. 59/1987]
18 APRIL 1992

***CRIMINAL PROCEDURE:*** *Trafficking in Dangerous Drugs - Defence of absence of knowledge of drugs - Statutory presumption as to knowledge on part of carrier - Acute conflict of evidence pertaining to ownership of bag - Question of central importance to defence case - Failure to evaluate witness testimony - Glaring omission by Judge to give proper weight to and draw proper inferences from conflicting evidence - Liberty of appellate Court to act upon its own view of the conflicting evidence - Dangerous Drugs Act 1952 (Revised 1980), ss. 37(d), (da), 39B(1)(a)*

***CRIMINAL PROCEDURE:*** *Appeal - Situation where the appellate Court is entitled to act on its own view of the oral testimony tendered in the case at first instance.*

The appellant had been convicted on a charge of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and sentenced to death. His defence centered upon the fact that on the day in question at the material time he had with him two bags. Only one belonged to him and the other unknown to him contained cannabis. He claimed he had been handed the second bag by a friend who stood some way behind him in the queue at the customs check-point. Prosecution evidence had not indicated the presence of two bags but merely one. However, under cross examination, one prosecution witness had admitted the presence of 2 bags. The trial Judge in his grounds of judgment had made no reference to the aforesaid cogent fact in the defence case nor to the acute conflict of evidence. Hence, this appeal.

**Held:**

**[1]** The presumptions under s. 37(d) and (da) of the DDA 1952 operated against the accused until the contrary was proven by the defence case.

**[2]** The learned Judge had made a glaring omission in failing to mention in his grounds of judgment a cogent fact, upon which there was a conflict of evidence and which was capable of raising more than a reasonable doubt in the case of the prosecution.

**[3]** As a result of this omission, the appellate Court could only assume that the learned Judge had failed to give the cogent fact its due weight and importance and which if duly considered was capable of raising more than a reasonable doubt in the case of the prosecution.

**[4]** An appellate Court was entitled to act upon its own view of the oral evidence where the trial Judge had failed to observe inconsistencies or to take account of material circumstances or probabilities.

*[Conviction quashed. Sentence of death set aside. Appellant acquitted and discharged.]*

**[Bahasa Malaysia** Translation of Headnote]

***PROSEDUR JENAYAH:*** *Pengedaran dadah merbahaya - Penafian tentang kewujudan dadah dalam bag - Anggapan bawah statut tentang pengetahuan seseorang tertuduh mengenai kehadiran dadah - Konflik keterangan yang ketara - Fakta yang penting kepada kes defendan - Kegagalan menilaikan testimoni saksi-saksi - Kegagalan ketara oleh Hakim untuk memberi cukup perhatian dan kesimpulan yang memadai dari keterangan yang berkonflik - Kebebasan Mahkamah Rayuan untuk bertindak atas pendapatnya sendiri - Akta Dadah Merbahaya 1952 (Disemak 1980), ss. 37(d), (da), s. 39B(1)(a).*

***PROSEDUR SIVIL:*** *Samada Mahkamah Rayuan berhak membuat kesimpulannya sendiri setelah mengkaji keterangan yang dikemukakan di Mahkamah Tinggi.*

Perayu telah disabitkan tuduhan mengedar dadah merbahaya di bawah s. 39B(1)(a) Akta Dadah Merbahaya 1952 dan dihukum mati. Pembelaannya berdasarkan terutamanya atas fakta berikut iaitu pada hari dan waktu yang berkenaan dia membawa bersamanya dua buah beg. Hanya satu beg kepunyaannya dan beg yang lain tanpa kesedarannya, mengandungi dadah "kanabis". Dia menuntut yang dia telah diberi beg kedua itu oleh seorang kawan yang berbaris dibelakang dia di pusat kawalan kastam. Keterangan pendakwa tidak menyentuh mengenai kewujudan 2 buah beg. Walau bagaimanapun sewaktu pemeriksaan balas salah satu saksi pendakwa mengakui adanya dua beg pada masa itu. Hakim bicara dalam alasan-alasan keputusannya tidak merujuk atau menyentuh mengenai konflik fakta-fakta ini ataupun pada pengakuan saksi pendakwa.

**Diputuskan:**

**[1]** Anggapan (presumption) di bawah s. 37(d) dan (da) Akta Dadah Merbahaya 1952 beroperasi terhadap yang tertuduh sehingga dibuktikan sebaliknya oleh kes pembelaan.

**[2]** Hakim yang Arif telah melakukan satu pelangkauan yang menjolok mata kerana tidak menjelaskan dalam alasan-alasan keputusan mengenai satu fakta yang menyakinkan (cogent fact). Malah fakta itu berkaitan dengan keterangan yang berkonflik dan mempunyai keupayaan membangkitkan keraguan yang lebih dari munasabah.

**[3]** Hasilnya daripada pelangkauan, Mahkamah Rayuan hanya boleh membuat andaian bahawa Hakim yang arif telah gagal memberi perhatian yang memadai kepada fakta "cogent" itu, yang sekiranya dikaji boleh membangkit lebih dari keraguan yang munasabah dalam kes pendakwa.

**[4]** Mahkamah Rayuan berhak bertindak atas pandangannya sendiri berdasarkan keterangan oral di mana Hakim Bicara telah gagal memerhatikan ketidakseimbangan fakta-fakta atau mempertimbangkan hal-hal keadaan yang material atau semua kebarangkalian.

*[Rayuan dibenarkan. Sabitan dibatalkan. Hukuman mati diketepikan. Perayu dibebaskan dan dilepaskan.]*

**Cases referred to:**

*Khoo Sit Hoh & Ors. v. Lim Thean Tong [1912] AC 93* ***(foll)***
*Coghlan v. Cumberland [1898] 1 Ch D 704* ***(foll)***
*Bigsby v. Dickenson [1976] 4 Ch D 24* ***(foll)***
*Watt Or Thomas v. Thomas [1947] AC 484* ***(foll)***
*R v. Wallace 23 CAR 32 CCA* ***(foll)***
*Jubri v. PP [1962] MLJ 34* ***(foll)***

**Legislation referred to:**

Dangerous Drugs Act 1952, ss. 37(d), (da), 39B

*For the appellant - Paramjit Singh (Jula Singh with him); M/s. Paramjit & Co.*
*For the DPP - Suriyadi Hashim*

**JUDGMENT**

**Edgar Joseph Jr SCJ:**

This appellant had been convicted in the High Court sitting at Kangar of a charge that he did on 2 July 1983, traffick on his own behalf, in a dangerous drug, to wit, 2,818 grammes of cannabis, an offence in contravention of para. (a) of subsection (1) of s. 39B of the Dangerous Drugs Act 1952 (Revised 1980), ("the Act") and sentenced to death, after a lengthy trial which ended on 27 August 1987. He now appeals against that conviction.

The whole of the material evidence has been carefully and critically examined before us and it is unnecessary to examine it again at any length. Suffice it to say, that the prosecution case, in broad outline, was that on the day concerned, at about 10.40 in the morning, a male Malay, coming from the direction of Pekan Siam, had arrived at the Customs Pedestrian Check Point in Padang Besar, on foot, carrying with him a travelling bag (Exh. P7), described as brown in colour, which he placed on the Customs Counter.

He was asked by Customs Officer Lim Soon Keat (PW7) to place the bag on the Customs Counter which he duly did. He was next asked by another Customs Officer, Hamzah bin Shafie (PW6), to unzip the bag, which he also duly did. In the bag, right on top, was a towel. When Hamzah attempted to examine the contents of the bag, the male Malay was alleged to have prevented him from doing so. He did this - to quote Hamzah - "by pressing his hand on my hand." At this point of time, according to Hamzah, he noticed just under the towel, in the bag, a brown coloured package, whereupon, the male Malay took to his heels, proceeding in the direction of Pekan Siam from whence he had come. Hamzah then pursued the male Malay, and after a very short chase, succeeded in apprehending him. That male Malay was the appellant.

The appellant was then brought to the office of the Senior Customs Officer, where a thorough search of the bag was duly conducted in his presence, resulting in the recovery therefrom of, *inter alia*, three brown packages, each containing dried leaves, greenish in colour, later examined by the Government Chemist who certified that they contained cannabis, a dangerous drug within the meaning of the Act, weighing 2,818 grammes. The appellant was then arrested and prosecuted upon the charge aforesaid.

Upon the facts outlined above, the learned trial Judge had quite correctly, ruled that the presumptions under s. 37(d) and (da) of the Act arose, their combined effect being, that it was to be presumed, until the contrary was proved, that the appellant knew of the presence of the cannabis in the bag, knew of its nature, and by reason of its weight exceeding the statutory minimum of 200 grammes, was a trafficker in the same.

Upon his defence being called, the appellant elected to give evidence upon oath but called no witnesses.

By way of introduction, he said that he was 39 years of age and that at the time of his arrest he was a petty trader dealing in aluminium ware, plying his trade at Pekan Sehari, Telok Murok, Kampong Gajah, Perak, ever since April 1983. He claimed that he bought his supplies from Pekan Siam because generally, they could be more cheaply had there than here.

Casting his mind back to the events of the morning of the day in question, he recalled that he had walked from Pekan Siam past the Pedestrian Check Point, carrying with him, **not** the brown travelling bag (Exh. P7) but a green travelling bag, into the Customs Check Point where there were a number of persons standing in the queue, including a Thai Citizen named Dollah, who he knew and who had asked him where he was going. In reply, the appellant said he was going home. Dollah said that he was going to Penang. The appellant then handed over his border pass for chopping at the Immigration Office, and claimed that, soon after, as he was about to move on, Dollah handed to him the brown bag (Exh. P7) for checking at the Customs Check Point, saying that he had to have his border pass stamped at the Immigration Office. The appellant duly obliged and added that on arrival at the Customs Counter he placed both the bags, that is to say, Dollah's brown bag and his own green bag, on the inspection counter for examination by a Chinese Customs Officer (later identified as Customs Officer Lim). Upon being asked by a Malay Customs Officer (later identified as Customs Officer Hamzah) about the contents of the brown bag, the appellant claimed that he had disclaimed knowledge thereof, at the same time, pointing to Dollah, who he said was behind him then. The appellant added that between him and Dollah were two others standing in the queue carrying boxes and, that as he pointed at Dollah, the latter took to his heels, pursued by a few Customs Officers. The appellant was detained on the spot, but Dollah made good his escape - so it was said.

The appellant was insistent that at the time he was detained, he was carrying not just the brown bag as alleged by Customs Officer Hamzah, but also his own green bag and that he had neither obstructed Customs Officer Lim from searching the brown bag nor had he attempted to flee from the scene.

Clearly, the question whether or not the appellant was carrying the two bags or just the one bag was a crucial factor having regard to the defence case, which was that he was an innocent carrier, at the behest of Dollah, of the brown bag which contained the cannabis. Upon this question, there was in fact corroboration of the most potent kind of the appellant's version which came from the lips of Customs Officer Lim himself who had admitted, though only under cross examination, that "it is true that there were two bags on that day," one being the brown bag containing the cannabis and the other a green bag which contained nothing incriminating.

On the other hand, it will be recalled, that Customs Officer Hamzah's evidence on this point was quite the contrary, he having alleged throughout that the appellant carried only one bag, namely, the brown bag containing the cannabis.

There was thus an acute conflict of evidence upon a question of central importance in the case for the prosecution itself, giving rise to more than a reasonable doubt as to whether the appellant carried one or two bags, the benefit to which he was plainly entitled.

The matter did not rest there because Customs Officer Lim had also testified, under cross examination, that he could not recall whether there were three to four persons in the queue at the counter behind the appellant when the appellant placed the luggage on the counter. Thus, upon the evidence for the prosecution, the possibility that the man Dollah was amongst the three or four persons who stood in the queue behind the appellant could not be ruled out.

In his grounds of judgment supplied to the Solicitors for the appellant some four years after notice of appeal had been lodged, the learned Judge made no mention of the cogent fact that Customs Officer Lim had admitted, that the appellant was indeed carrying the two bags

in question at the material time. We could only assume from this glaring omission, that the learned Judge had failed to take into account, or give proper weight to, or draw proper inferences from, the fact that the appellant might have carried the two bags at the material time. Had he done so, he might well have considered the appellant's explanation that he was carrying the brown bag with its offending contents at the behest of Dollah, in a more favourable light than he had done. In which case, the learned Judge might also have regarded with considerable scepticism the testimony of Customs Officers Lim and Hamzah that the appellant had obstructed the inspection of the brown bag or that he had attempted to flee from the scene.

We recognised that the learned trial Judge had a great advantage, denied to his Court, of seeing and hearing the witnesses and the appellant testify. Be that as it may, there is a wealth of authority for the proposition that upon an issue depending upon oral evidence where there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial Judge, who has seen and heard the witnesses, except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities. (See for example, *Khoo Sit Hoh & Ors. v . Lim Thean Tong* [1912] AC 93). An appellate Court can, therefore, in appropriate cases, act upon its own view of the conflicting evidence. [See *Coghlan v. Cumberland* [1898] 1 Ch D 704; *Bigsby v. Dickenson* [1976 ] 4 Ch D 24].

In all the circumstances, having regard to the fact that the trial Judge had overlooked or failed to take into account or given proper weight to, or drawn proper inferences, from the matters to which we have adverted, which otherwise might have caused him to come to a different conclusion, we were satisfied that he had not taken proper advantage of his having seen and heard the witnesses [per Lord Thankerton in *Watt Or Thomas v. Thomas* [1947] AC 484] and so the present appeal came within the range of those cases where we were at liberty to act upon our own view of the conflicting evidence. Having done so, we were amply satisfied that "the case against the appellant was not proved with that certainty which is necessary in order to justify a verdict of guilty". [Per Hewart, CJ in *R v. Wallace* 23 CAR 32, 35 CCA applied by Thomson, CJ in *Jubri v. PP* [1962] MLJ 34].

The result, therefore was, that we allowed the appeal, quashed the conviction, set aside the sentence of death and acquitted and discharged the appellant.

Also found at [1992] 3 CLJ 1535